Supreme Court, U. S.
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No. 99-1005

In The

Supreme Court of the United States

ROBERT W. AYLWARD,

Petitioner,

versus

CLAIRE W. BAMBERG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court acted within its discretion by ordering that certain documents filed in conjunction with Defendant-Appellee Bamberg's Motion for Partial Summary Judgment be sealed and not presented to Plaintiff Aylward personally, but where the court allowed Aylward's counsel full and complete use of these documents as it related to this litigation and where Aylward has shown no prejudice.

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RULE CITED:

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STATEMENT OF THE CASE

In February 1992, Appellee, Claire Bamberg ("Bamberg"), a pastoral counselor, began counseling the four children of her patient, Julie Wisley ("Wisley") and Wisley's former husband, Appellant, Robert Aylward ("Aylward"). On August 14, 1992, Bamberg reported to military authorities at Fort Benning, Georgia, she suspected Aylward's children were being sexually abused. She did not accuse Aylward or speculate as to the identity of a potential perpetrator. Almost two years later, Aylward, a soldier at Fort Benning, filed a complaint, based upon diversity, in federal court against Bamberg alleging that the telephone call amounted to defamation. In response, Bamberg replied that Indiana Code § 31-33-5-1 (1997), Indiana's child abuse reporting statute, required her to make the report and provided her with a cloak of immunity. Indiana law provides civil immunity for an individual who reports her suspicions of child abuse or neglect unless the person "acted maliciously or in bad faith" and that good faith is to be presumed. Indiana Code §§ 31-33-6-1 to 31-33-6-3 (1997). Extensive discovery ensued, including Aylward taking Bamberg's deposition. During the pendency of this action, Aylward and Wisley were undergoing a "bitter" divorce.

On October 24, 1995, due to the obviously sensitive nature of the proceedings and concern for her potential liability for illegally revealing information obtained during her counseling with Wisley and the children, Bamberg filed a motion to seal certain counseling-related information and documents she wanted to submit in support of her motion for partial summary judgment. The

district court granted the motion and sealed certain documents from the public. The court further prohibited Aylward from viewing the documents and Aylward's counsel from discussing them with Aylward. The court did not prohibit Aylward's counsel from full access to the sealed documents. Aylward filed his objection to the motion to seal, which the Court denied. Aylward's counsel was provided copies of the sealed documents, and Aylward, through his counsel, filed a detailed response to the summary judgment motion. Following extensive briefing and motions by both parties concerning the evidentiary value of various documents, the district court carefully reviewed the materials set forth in Bamberg's motion for summary judgment and Aylward's response and granted summary judgment to Bamberg on the defamation claim.

Aylward took an interlocutory appeal pursuant to Fed. R. Civ. P. 54(b). After careful review of the proceedings, the Court of Appeals of the Seventh Circuit correctly affirmed the district court's judgment

A. The petition misrepresents Aylward's cause of action.

The petition misrepresents Aylward's complaint against Bamberg as being "essentially" a claim for conspiracy between Bamberg, Wisley, Aylward's former wife, and others, to commit slander against him. Pet. p. 2. In fact, the complaint named only Bamberg and alleged only defamation.

B. The petition misrepresents Aylward's objection to the Court's sealing the records.

The petition misrepresents that Aylward's objection to the court's sealing the specified records from Aylward's personal inspection or knowledge was that Bamberg could not claim a psychotherapist-patient privilege, and thus, there were no legally sufficient grounds to serve as the basis for sealing the record. Pet. p. 3. In fact, Aylward objected on the ground that the sealing procedure was "unfair" and that the seal prevented him from meaningfully participating in the prosecution and defense of his case. Pet. App. p. 8a.

C. The petition misrepresents that the circuit court agreed that Bamberg failed to show a privilege justifying sealing the record.

The petition misrepresents that the Court of Appeals of the Seventh Circuit agreed that Bamberg failed to show that a privilege justified sealing the documents. Pet. p. 4. In fact, the Seventh Circuit refused to make a determination of whether Bamberg's counseling sessions were subject to psychotherapist-patient relationship and/or clergy-penitent privileges because the Court determined this was not necessary for the resolution of the appeal. Pet. App. p. 7a.

ARGUMENT

Reasons for Denying the Writ

The petition's fact-bound claim that the trial court below abused its discretion in determining the necessity of sealing certain documents from Aylward's personal review, but not his attorney's, simply does not warrant review by this Court. As the Court of Appeals for the Seventh Circuit found, the decision was plainly a correct application of settled law and was within the accepted practice and usual course of proceedings for district courts. Further, Aylward has not even alleged a conflict among the circuits. As detailed below, there is no cause for this Court's review of Aylward's contention, which has already been rejected by the District Court and by the Seventh Circuit Court of Appeals. –

The trial court's decision to seal Bamberg's motion for summary judgment is reviewed for an abuse of discretion. *Cusack v. Bank United of Texas FSB*, 159 F.3d 1040, 1042 (7th Cir. 1998). A district court is given discretion to seal records where necessary to promote the interests of justice. *Grove Fresh Distrib. Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). While in our judicial system adversary proceedings are the norm and ex parte proceedings are the exception, courts have generally recognized the capacity of a district judge to "fashion and guide the procedures to be followed in cases before him." *United States v. Thompson*, 827 F.2d 1254, 1257 (9th Cir. 1987). "[D]istrict judges are able to consider matters that may be unique to particular fact situations and tailor procedures to serve the ends of justice . . ." *Id.* at 1258. Moreover, as noted by this Court, courts have the power

to insure that their records are not "used to gratify private spite or promote public scandal," and have "refused to permit their files to serve as reservoirs of libelous statements for press consumption." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).

Accordingly, given the sensitivity of the counseling and medical records concerning third parties and the potential abuse of the records both in the pending divorce proceeding and through recrimination toward the children, the impartial district court's procedure was manifestly acceptable and within its discretion in balancing the rights of Aylward, Bamberg, and the third parties – namely Wisley and the four children. *See e.g., Meridian Intern. Logistics, Inc. v. United States*, 939 F.2d 740, 745 (9th Cir. 1991), in which the Ninth Circuit found that the trial court acted properly when it sealed FBI declarations from the public as well as from the plaintiff and his counsel and then reviewed the declarations in deciding the defendant's dispositive motion.

Further, the district court's actions are acceptable and within the usual course of proceedings given the well-recognized "need to protect the physical and psychological well-being of child abuse victims in judicial proceedings" necessitating "a variety of measures . . . to ameliorate the harsh consequences associated with child abuse cases." *Aylward v. Bamberg*, 187 F.3d 921 (7th Cir. 1999), citing *Maryland v. Craig*, 497 U.S. 836, 843 (1990), as well as several cases dealing with uniquely crafted procedures to protect children during criminal trials. Pet. App. pp. 8a-9a. Thus, it is the accepted and usual course in criminal judicial proceedings for courts to strike an

appropriate balance between the need to provide a supportive environment for the child witness and a defendant's right to a fair trial. In light of the extraordinary measures courts are willing to go to protect a child's interest in criminal cases, where the stakes are much higher, the Seventh Circuit correctly found no need to deviate from the accepted practice and usual course of protecting child abuse victims by balancing the interests of the children with the interests of the parties in a civil case for money damages.

Finally, Aylward has not stated any way whatsoever in which he was prejudiced because he was not personally able to review the sealed documents. As noted by the Seventh Circuit, Aylward was given opportunity to object to the motion to seal. Pet. App. pp. 7a-8a. The district court's order provided for the future review of the order "either at trial or at some point prior to trial" should either party find publication "necessary to preserve their rights in this lawsuit or to litigate their position." Pet. App. pp. 22a-23a. Aylward was not prevented from responding in full to the motion for summary judgment, and as the Seventh Circuit recognized, Aylward's counsel reviewed the sealed documents thoroughly and prepared a detailed response on behalf of Aylward to the motion for summary judgment. Pet. App. p. 8a.

Aylward was afforded ample opportunity through the discovery process to gather information, if any existed, to permit him to survive a motion for summary judgment. Indeed, Aylward deposed Bamberg as well as the Fort Benning soldier to whom Bamberg reported her suspicions. Despite extensive discovery, Aylward was unable to show a genuine issue of fact indicating an

improper motive on the part of Bamberg so as to dispel the cloak of immunity that the child abuse reporting statute granted Bamberg and deny Bamberg summary judgment. Finally, Aylward has been unable to point to any prejudice resulting from his personal inability to review the sealed documents, even after he had opportunity to view multiple briefs discussing the records in detail during the appellant procedure.

The Court of Appeals properly found the District Court's Order granting the Motion to Seal was manifestly reasonable. It protected the rights of all concerned, while also allowing full adjudication of the issue raised by the Motion for Partial Summary Judgment. Aylward was not prejudiced by this procedure in any way whatsoever. This ruling did not depart from the accepted and usual course of judicial proceedings and does not call for an exercise of this Court's supervisory powers.

CONCLUSION

Certiorari is not warranted. The Seventh Circuit correctly applied the applicable federal rules of trial procedure. For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: January 14, 2000

Respectfully submitted,

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